

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMUEL EUGENE CALHOUN, # 379175,)	
)	
Petitioner,)	Case No. 1:09-cv-468
)	
v.)	Honorable Robert Holmes Bell
)	
JOHN PRELESNIK,)	
)	
Respondent.)	
)	

ORDER GRANTING LEAVE TO AMEND PETITION

This is a habeas corpus proceeding brought by a state prisoner pursuant to 28 U.S.C. § 2254. Petitioner is serving a parolable life sentence, after his convictions for first-degree criminal sexual conduct in the Berrien County Circuit Court. After respondent filed his answer and the Rule 5 materials, petitioner submitted a motion to amend the petition to add a claim of sentencing error recently rejected by the trial court in post-judgment proceedings. Petitioner also requests a ruling that his claim of sentencing error be deemed to relate back to the original date of filing this habeas corpus action. Respondent has not answered the motion to amend, and the time to do so has now expired.

Because respondent has not objected to the amendment of the petition, the motion to amend will be granted. The petition is deemed amended to add a claim of sentencing error arising from the trial court's alleged reliance on prior, uncounseled misdemeanor convictions. Respondent will be ordered to answer the amended petition. The court will not determine at this time whether the amendment relates back to the date of filing the original petition. The relation back issue is relevant only as a reply to the State's assertion of the statute of limitations defense. Respondent has not

answered the amended petition and therefore has not raised that or any other affirmative defense. At this point, therefore, petitioner is seeking an advisory opinion. If respondent raises a statute of limitations defense, petitioner may raise the relation back argument, which will be decided in accordance with the principles of *Mayle v. Felix*, 545 U.S. 644 (2005). Accordingly:

IT IS ORDERED that petitioner's motion to amend (docket # 46) be and hereby is GRANTED. The petition is deemed amended to include an additional ground for relief, arising from the sentencing court's alleged reliance on prior, uncounseled misdemeanor convictions.

IT IS FURTHER ORDERED that respondent shall file an answer to the amended petition no later than **January 28, 2011**. The answer shall comply with the requirements of Rule 5 of the Rules Governing Section 2254 Cases. Respondent is notified that the failure to raise affirmative defenses may constitute a waiver of such defenses. Petitioner may submit a reply to respondent's answer, limited to the claim of sentencing error, within 42 days after the answer is filed. Rule 5(e), RULES GOVERNING SECTION 2254 CASES.

IT IS FURTHER ORDERED that petitioner's request for a ruling on the relation back issue is hereby DENIED without prejudice.

DONE AND ORDERED this 14th day of December, 2010.

/s/ Joseph G. Scoville
United States Magistrate Judge